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CONCORD, N.H.

The Honorable, Earl Gregg,
Governor of New Hampshire,
Concord, New Hampshire

Re: Whether or not the Adjutant General would
become a holdover if a successor is not
appointed

Dear Governor Gregg:

The Adjutant General is a constitutional officer. Part II, Article 46, Constitution of New Hampshire. By N.H., c. 103, c. 36, as amended by Laws of 1951, c. 103, the Adjutant General shall hold office until he shall have reached the age of sixty-five years,¹ A distinction is made between statutes which are a limitation of a public officer's official tenure and statutes which limit the right of resignation. Statutes of the State, 62 N.H. 706, 707. Whether the Adjutant General can become a holdover depends on whether the limitation by statute mentioned goes to his qualifications to hold the office. I am of the opinion that it does.

The statute does not expressly prohibit holding office after the Adjutant General has attained age sixty-five as is the case with respect to judges. N.H., c. 26, c. 2. Nevertheless, the fact that it is not provided that the Adjutant General shall hold office until a successor is qualified indicates an intent of the Legislature that the office shall become vacant.

It will be noted that Laws of 1963, chapter 39, relative to terms of office of the heads of certain departments, expressly provides that as to each of those officers mentioned the incumbent shall hold office until his successor is duly appointed and qualified. The Adjutant General is not included in the list of those for whom this express holdover provision is made. The Legislature must be presumed to have known this when enacting c. 103, Laws of 1951.

C O P Y

His Excellency, Hugh Gregg

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If the Adjutant General should hold over after expiration of his term, he would not be a de facto officer thereafter but a de jure officer in that, although he would be entitled to the emoluments of the office and could not be punished as an intruder, his temporary continuation would not prevent the existence of a vacancy of the office with the need for a de facto filling of the office as provided in Article 46 of the Constitution of New Hampshire.

While the Adjutant General might continue in the position as such a de facto officer, his legal tenure of office expires upon his attaining age thirty-five. R.S., c. 149, s. 33, and R.S., c. 149, s. 34 as amended by Laws of 1951, c. 103, s. 3, and a vacancy exists which requires filling the office. Attorney General v. Stewart, 97 N.H. 228; Attorney General v. Stewart, 97 N.H. 228. During any such continuance, the official acts of the Adjutant General are not binding on third parties and only prima facie valid also in respect to the public, subject to the official character of his acts being established.

Respectfully,

George F. Nelson
Assistant Attorney General

ENCLOSURE